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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

OLAN J. GUILBEAU, SR., MACKLYN GUILBEAU,

Petitioners,

v.

W.W. HENRY COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, W.W. Henry Company ("Henry"), requests this Honorable Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which was entered in this case on June 11, 1996. (Citations to the opinion are to the page numbers of Appendix A, annexed to the petition.)

Petitioners present two questions for review: What is the correct standard for reviewing the sufficiency of expert evidence after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), and may a judge constitutionally second-guess a jury's evaluation of conflicting expert testimony. Respondent understands petitioners' desire to attract this Court's attention with important-sounding issues, but this Court has already answered both questions and should not waste a precious writ when a citation will do. The standard for reviewing the sufficiency of expert evidence is the same now as it was before *Daubert*, and the Seventh Amendment does not prohibit a court of appeals from reversing and rendering judgment for a defendant when the evidence does not support the verdict.

REASONS FOR DENYING THE PETITION

The standard for passing on the sufficiency of any evidence, scientific or otherwise, under Rule 50 has long been settled: It is not whether there is no evidence, but whether there is sufficient evidence upon which a reasonable jury could find for the plaintiff. *Anderson v. Liberty*

Lobby, Inc. 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Wilkerson v. McCarthy*, 336 U.S. 53, 62, 69 S.Ct. 413, 417, 93 L.Ed.2d 497 (1949); *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872) (Is there "any [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed"). All courts of appeal apply the same standard.[1]

This has been the standard of the Fifth Circuit since at least 1969, when the court of appeals rendered its *en banc* decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc): "If the facts and inferences point so strongly and overwhelmingly in favor of one party the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict or judgment notwithstanding the verdict] is

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[1] *CPC Intern v. Northbrook Excess & Surplus Ins.*, 46 F.3d 1211, 1214 (1st Cir. 1995) (judgment as a matter of law proper when "no reasonable jury could find in plaintiffs' favor on any permissible claim or theory"); *Eagleston v. Guido*, 41 F.3d 865, 875 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 53, 133 L.Ed.2d 18 (1995); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 69 F.3d 604, 613 (3rd Cir. 1995); *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148 (5th Cir. 1995), *cert. denied*, 113 L.Ed.2d 664, 70 FEP (BNA) 1376 (1996); *Bills v. Aseltine*, 52 F.3d 556 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 179, 133 L.Ed.2d 2118 (1995); *Thomas v. U.S.*, 41 F.3d 1109 (7th Cir. 1994); *Sherlock v. Quality Equipment Co., Inc.*, 79 F.3d 731 (8th Cir. 1996); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992), *cert. denied*, 114 S.Ct. 345, 126 L.Ed.2d 310 (1992); *Clark v. Brien*, 59 F.3d 1082, 1086 (10th Cir. 1995); *Walker v. Nationsbank of Florida, N.A.*, 53 F.3d 1548, 155 (11th Cir. 1995); *Bennett Enterprises, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 174, 133 L.Ed.2d 115 (1995).

proper." (quoted in Judge Barksdale's opinion at page 24a in the petition). The standard has often been applied to reverse verdicts based on unreliable or factually unsupported expert testimony. Contrary to petitioners' argument on page three of the petition, the decision to reverse in this case is fully consistent with prior Fifth Circuit cases.

In *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir. 1989), *modified*, 884 F.2d 166, *cert. denied*, 494 U.S. 1046, 110 S.Ct. 1511, 108 L.Ed.2d 646 (1990), noting that juries are not free to draw unreasonable inferences from the evidence, the Fifth Circuit held that plaintiff's scientific evidence was insufficient to support the jury's verdict that Bendectin, the same drug at issue in *Daubert*, causes birth defects. The Fifth Circuit likewise reversed a jury verdict in *Thompson v. Southern Pacific Transportation Co.*, 809 F.2d 1167 (5th Cir. 1987), because plaintiff's expert proof of medical causation was factually unsupported and therefore insufficient to support a jury verdict. *Accord, Christopherson v. Allied-Signal Corp.* 939 F.2d 1106 (5th Cir. 1991) (expert's opinion concerning toxic exposure inadmissible when based on inaccurate assumptions of length and concentrations of exposure); *Slaughter v. Southern Talc Co.*, 919 F.2d 304, 306 (5th Cir. 1990) (sources of expert opinions replete with "so many obvious errors as to be of no value to the trier of fact").

Daubert, as this Court is aware, rejected the "general acceptance" test under *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923) and held that the correct standard for the admission of expert testimony is Rule 702 of the Rules of Evidence. But *Daubert* did not suggest

a different standard for evaluating the sufficiency of scientific evidence. To the contrary, this Court said just the opposite: Even if such testimony is admitted, a trial court should still direct a judgment under Rule 50 of the Rules of Civil Procedure if "the scintilla of evidence is insufficient to allow a reasonable juror to conclude that the position more likely than not is true." *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798. This Court cited *Brock* as exemplary authority for reversing verdicts which are based on unreliable scientific evidence. *Id.*

Petitioners' second question raises a false issue. Of course the Seventh Amendment forbids a judge from invading the fact-finding province of the jury, but the sufficiency of the evidence is a question of law for the court alone, and the standard for passing on that question is the same under Rule 50(b) for an appellate court as it is for a district court. *Anderson*, 477 U.S. at 251, 106 S.Ct. at 2512. "And it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321, 87 S.Ct. 1072, 1076, 18 L.Ed.2d 75 (1967); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

In this case respondent specifically challenged the sufficiency of plaintiff's evidence on both issues of defect and causation. A cursory review of the decision shows that Judge Barksdale applied the correct standard in reviewing both issues and determined, with Judge Emilio Garza's concurrence, that plaintiff's evidence was insufficient to support the jury's verdict on the issue of product defect. At page 2a of the opinion (Appendix A), Judge Barksdale held: "Because no rational juror could find that

Henry's product was defective, the judgments . . . are REVERSED and judgment is rendered for Henry."

The central problem was that petitioners' expert identified the wrong chemical in respondent's product, which is a widely used and commonly available carpet adhesive. The expert assumed that the product contained pentachlorophenol and testified that the product was unreasonably dangerous solely due to the presence of that chemical. (Appendix A, page 30a of the petition). But the incontrovertible evidence was that the product did not contain pentachlorophenol. It contained 0.2% of sodium pentachlorophenate, which is a completely different compound with no known toxic effects on either the central or peripheral nervous systems. (Appendix A, page 36a of this petition.)

In short, the verdict was based on an undeniable mistake,[2] and the court of appeal was right to reverse: "[T]he verdict cannot be sustained under [petitioners'] theory (claim) that the product was defective because it contained pentachlorophenal." (Appendix A, page 37a of the petition.)

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[2] Even the dissent conceded that petitioners' expert mistakenly believed that "Henry's glue contained pentachlorophenol" (Appendix A, page 54a of the petition) and that "any testimony based upon the presence of pentachlorophenol cannot support the verdict." (Appendix A, page 55a of the petition.)

CONCLUSION

The petition states no compelling reason why this Court should grant a writ of certiorari. The decision of the Fifth Circuit does not conflict with a decision of another court of appeals, has not decided an important federal question that conflicts with a decision of the Louisiana Supreme Court, and has not in any way departed from accepted judicial proceedings as to warrant this Court's supervision. To the contrary, Judge Barksdale's opinion contains an exhaustive analysis of the evidence under the correct legal standard of review. Plaintiff's proof was not sufficient to support a verdict on the issue of product defect. Judge Emilio Garza concurred, and no other active judge thought petitioners' suggestion for rehearing en banc had merit.

Petitioners' dissatisfaction with the decision does not warrant review by this Court: "A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10 of the Rules of the Supreme Court.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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December 13, 1996